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IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR NANA REGIONAL CORPORATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

NANA Regional Corporation, Inc. (NANA) is an Alaska corporation formed pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601, *et seq.*, and the laws of the State of Alaska to "promote the economic, social and personal well being" of the Natives of the northwest region of Alaska.[1] NANA owns the land and mineral re-

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of the brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

sources underlying the Red Dog Mine (Mine), and leases the Mine property to Teck Cominco Alaska Incorporated (Teck Cominco) under a long-term mining agreement. The actions taken by the United States Environmental Protection Agency (EPA) threaten the further development of the Mine, potentially depriving NANA shareholders of jobs and reducing NANA's earnings. NANA filed an amicus brief supporting the position of the Alaska Department of Environmental Conservation (ADEC) and Teck Cominco in proceedings before the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

While NANA does not argue the merits in this brief, it does agree with the ADEC and Teck Cominco that the EPA does not have authority under §§ 113(a)(5) or 167 of the Clean Air Act (CAA) 42 U.S.C. §§ 7413(a)(5) and 7477, to unilaterally override a BACT decision by a State which, as here, was made following an EPA-approved State Implementation Plan applying the factors set out in § 169(3) of the CAA, 42 U.S.C. § 7479(3).

Further, NANA supports the terms of the Prevention of Significant Deterioration (PSD) permit issued by the State of Alaska on December 10, 1999, to Teck Cominco. Specifically, NANA supports ADEC's decision regarding the Best Available Control Technology (BACT) provisions included in that permit along with Teck Cominco's voluntary agreement to install low Nitrogen Oxide (NOx) technology on six of Teck Cominco's generators.

ARGUMENT

The Alaska Native Claims Settlement Act of December 18, 1971, PL 92-203, 85 Stat. 688, codified at 43 U.S.C. §1603, called for the establishment of thirteen Regional Corporations, representing the different Native groups throughout Alaska to "promote the economic, social and personal well being of their shareholders. It also created over 200 village

corporations. NANA was the Regional Corporation formed for the Native people of the northwest region of Alaska.[2]

Congress required the Regional Corporations to be incorporated as for-profit corporations, and anticipated that they would become the primary vehicles for the economic development of their region of the State. 43 U.S.C. § 1606. In particular, the subsurface, or mineral lands, were viewed by Congress as a key component of the economic portion of the settlement. The Senate Interior Committee Report notes that an essential aspect of the settlement is a grant of land for use "as a resource base for Native commercial enterprises." S. Rep. 92-403, p. 79 (October 21, 1971). The House Resources Report 92-523 echoes this sentiment:

> The proposed bill, through a combination of providing land and money for the settlement for the Native claims, will provide ... land that is necessary for the living and subsistence of those Natives who continue to rely on the land for their living, *while at the same time providing an economic settlement both in terms of cash contributions and patents to land and mineral rights ... which will be used by the Natives for promoting their economic development to the fullest extent possible.*

Rogers C. B. Morton, Secretary of the Interior's comments to the Speaker of the House. H. R. Rep. 92-523 (Sept. 28, 1971) (emphasis added). As the language of the Act and the legislative history shows, self-determination of Natives through economic independence was an important goal of ANCSA.

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[2] There originally were eleven village corporations in the NANA Region. In the late 1970's, NANA merged with ten of those village corporations.

NANA holds extensive land and mineral resources, including the land and mineral resources underlying the Red Dog Mine (Mine).[3] It leases the Mine property to Teck Cominco under a long-term mining agreement the parties entered into in 1989 (the "Agreement").

Under the Agreement, Teck Cominco developed and now operates the Mine and pays NANA a royalty for the metals mined. The Mine is the only major source of non-governmental jobs in the NANA region. It is the centerpiece of NANA's effort to provide meaningful jobs to its shareholders. On average, 60% of the Mine's workforce consists of NANA shareholders or their spouses. In addition, NANA subsidiaries provide many services to Teck Cominco at the Mine. NANA Management Services LLC provides food service, housekeeping and maintenance. NANA-VECO joint venture performs construction projects. NANA Dynatec Drilling LLC, has done most, if not all, of the exploratory drilling for the Mine. NANA/Lynden LLC transports barge supplies to the Mine from the Mine's port site and hauls the zinc and lead concentrates from the Mine to the port. A substantial portion of the employees of these NANA subsidiaries also are NANA shareholders.

In addition to the benefit these jobs provide to individual shareholders, the wages paid to NANA shareholders have a substantial import on the overall economy of the Region. As stated on pages 46 and 47 of the December 10, 1999, Final Technical Analysis Report by ADEC, J.A. 207, Red Dog

[3] Unless otherwise indicated, the facts in this brief are supported by the January 31, 2003, Affidavit of Marie N. Greene, President of NANA, filed with the Federal District Court of Alaska in Case No. A02-231 Civil (JWS) *Kivalina Relocation Planning Committee v. Teck Cominco Alaska Incorporated*, and the June 28, 2000, Letter of Support signed by NANA Vice President and General Counsel, Jacquelyn R. Luke, filed with the United States Court of Appeals for the Ninth Circuit in Support of NANA's Amicus Brief in this matter.

Mine has greatly boosted the local economy. The Mine's annual payroll of $26.4 million represents over a quarter of the local Borough's total wages and salaries. NANA also receives substantial royalty income and income from its contracts with Teck Cominco. Teck Cominco also contributes substantially to the economy of the Region through its payments in lieu of taxes to the Northwest Arctic Borough.

In the absence of the Mine, the economic opportunities in the Region would be considerably less. Non-Red Dog related jobs in the villages in the NANA region are very limited and are usually related to government-funded positions such as the post office, school district and health service.

Although jobs and economic opportunity are very important to NANA, the land and its resources remain uppermost in the minds of the corporation and its shareholders. Most shareholders living in the Region still rely on a subsistence way of life that requires hunting and gathering from the bounty of the land. Thus, preservation of the land and its environment are first priorities for NANA.

Indeed, the Agreement between NANA and Teck Cominco reflects that one of NANA's core concerns is protection of the subsistence resources. The Agreement establishes a Subsistence Committee (Committee), which advises NANA and Teck Cominco management on the interaction between Mine operations and subsistence resources. The Committee authorizes and reviews a yearly caribou study. When caribou are in the vicinity of the haul road running between the Mine and the port, the Committee shuts down portions of the road. In fact, NANA has the power under the Agreement to direct Teck Cominco to shut down some or all of the Mine's operations if they threaten subsistence.

When mining operations conclude and Teck Cominco's leasehold terminates, the Mine property will revert to NANA. NANA has a fundamental interest in ensuring that the land and waters in the vicinity of the Mine do not pose a threat to

subsistence resources. Again, while Teck Cominco operates the Mine, NANA monitors and has the power to regulate the mining operation to prevent adverse impacts to the value and utility of NANA's real property.

In short, NANA did not move forward with the Mine until it was convinced that the development could occur without adversely impacting the environment. During the operation of the Mine, NANA holds and exercises the power to prevent adverse environmental impacts.

NANA objects to the EPA's issuance of the enforcement orders in dispute here enjoining ADEC and Teck Cominco from installing and operating the generator in question. NANA's opposition rests first on its concurrence with ADEC and Teck Cominco that the EPA does not have the authority under §§ 113(a)(5) or 167 of the Clean Air Act, 42 U.S.C. §§ 7413(a)(5)(A) and 7477, to unilaterally issue orders overriding a State's BACT decision that, as here, was made following an EPA-approved State Implementation Plan applying the BACT factors set out in § 169(3) of the Act, 42 U.S.C. § 7479(3).

NANA's support rests, second, on its comfort with the terms of the PSD permit issued by the State on December 10, 1999, to Teck Cominco, which include the BACT provisions included in tha permit and Teck Cominco's agreement to voluntarily install low NOx technology on all of its primary generators.

NANA, accordingly disagrees with the Ninth Circuit Court of Appeals' decision in *Alaska Department of Environmental Conservation v. United States Environmental Protection Agency*, 298 F.2d 814 (C.A.9 2002), and urges its reversal.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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